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# In the Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:
DOW CHEMICAL COMPANY, MONSANTO CHEMICAL, ET. AL.,
*Petitioners,*

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR THE PETITIONERS

ANDREW L. FREY
PHILIP ALLEN LACOVARA
CHARLES A. ROTHFELD
RICHARD B. KATSKEE
STEVEN J. DUFFIELD
*Mayer, Brown, Rowe & Maw*
*1909 K Street, N.W.*
*Washington, D.C. 20006*
*(202) 263-3000*

*Counsel for Petitioner*
*Dow Chemical Company*

SETH P. WAXMAN
*Counsel of Record*
LOUIS R. COHEN
JOSHUA S. GOLDWERT
SHIRLEY C. WOODWARD
*Wilmer, Cutler & Pickering*
*2445 M Street, N.W.*
*Washington, D.C. 20037*
*(202) 663-6000*

*Counsel for Petitioner*
*Monsanto Company*

**(Additional Petitioners' Counsel Listed on Inside Cover)**

63pp

MICHELE L. ODORIZZI
*Mayer, Brown, Rowe & Maw*
*190 South LaSalle Street*
*Chicago, Illinois 60603*
*(312) 782-0600*

STEVEN BROCK
*Rivkin Radler LLP*
*EAB Plaza*
*Uniondale, New York 11556*
*(516) 357-3000*

*Counsel for Petitioner*
*Dow Chemical Company*

JOHN C. SABETTA
*Seyfarth Shaw*
*1270 Avenue of the Americas*
*New York, New York 10020*
*(212) 218-5500*

NOAH A. LEVINE
*Wilmer, Cutler & Pickering*
*399 Park Avenue*
*New York, New York 10022*
*(202) 230-8800*

*Counsel for Petitioner*
*Monsanto Company*

*Kelley Drye & Warren LLP*
*101 Park Avenue*
*New York, New York 10178*

*Counsel for Petitioner*
*Hercules Incorporated*

*Cadwalader, Wickersham*
*& Taft*
*100 Maiden Lane*
*New York, New York 10038*
*(212) 504-6000*

*Counsel for Petitioners*
*Occidental Chemical*
*Corporation, Ultramar Diamond*
*Shamrock Corporation, Maxus*
*Energy Corporation, and*
*Chemical Land Holdings, Inc.*

MYRON KALISH
*50 East 79th Street*
*New York, New York 10021*
*(212) 737-8142*

*Counsel for Petitioners*
*Uniroyal, Incorporated and*
*Uniroyal Chemical Company*

*Clark Gagliardi & Miller, P.C.*
*The Inns of Court*
*99 Court Street*
*White Plains, New York 10601*
*(914) 946-8900*

*Counsel for Petitioners*
*TH Agriculture & Nutrition*
*Company, Incorporated,*
*Thompson-Hayward Chemical*
*Company, and Harcros*
*Chemical, Incorporated*

## QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

## PARTIES TO THE PROCEEDING

Petitioners:

Dow Chemical Company

Monsanto Company

Hercules Incorporated

Occidental Chemical Corporation

Ultramar Diamond Shamrock Corporation

Chemical Land Holdings, Inc.

Maxus Energy Corporation

Harcros Chemical, Inc.

Thompson-Hayward Chemical Company

T H Agriculture & Nutrition Company, Inc.

C.D.U. Holdings, Inc.

Uniroyal, Inc.

Uniroyal Chemical Company

Respondents:

Daniel Raymond Stephenson

Susan Stephenson

Daniel Anthony Stephenson

Emily Elizabeth Stephenson

Joe Isaacson

Phyllis Lisa Isaacson

The disclosure statement required by Rule 29.6 appears in the petition for a writ of certiorari.



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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 273 F.3d 249. The orders of the district court (Pet. App. 23a-26a) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on November 30, 2001, and a timely petition for rehearing was denied on May 8, 2002. On July 29, 2002, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until August 20, 2002. The petition was granted on November 4, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * * ."

Rule 23(a) of the Federal Rules of Civil Procedure provides in relevant part: "One or more members of a class may sue or be sued as representative parties on behalf of all only if * * * (4) the representative parties will fairly and adequately protect the interests of the class."

## STATEMENT

This litigation involves a "mass tort" suit that was brought as a class action nearly twenty-five years ago. In that case, the district court, after considering and rejecting numerous challenges to the appropriateness of class treatment, certified a class in 1983 upon finding that all prerequisites for class action treatment (including adequacy of representation) had been met. The parties settled the case in 1984, and a final judgment was entered that (1) required the defendants – now petitioners in this Court – to pay $180 million into a fund to be distributed by the district court for the benefit of the class and (2) permanently barred all class members from instituting against any of the

defendants actions that relate to the subject matter of the complaint. The court of appeals upheld the settlement and affirmed the judgment in 1987, specifically rejecting a challenge to the adequacy of the class representation. Petitioners paid almost $200 million for the benefit of the class members.

In 1998, fifteen years after the class was certified, more than ten years after the judgment became final on appeal, and several years after all of the settlement funds had been disbursed, two members of the plaintiff class – now respondents in this Court – brought a new suit against petitioners, arguing that they had not been adequately represented at the time the class was certified and therefore should not be bound by the class judgment. In particular, respondents contended that class representation must have been inadequate because, as matters turned out, they did not receive benefits from the settlement as great as those received by certain other class members. The court of appeals agreed, holding (1) that class members who contest the adequacy of representation may collaterally attack class certification decisions long after the case is resolved and (2) that in such a collateral challenge the court should determine the adequacy of representation not as of the time of the original litigation, but in light of events and changes in the law occurring years after the settlement became final. The question now before the Court is whether those holdings were correct.

1. Beginning in the late 1970s, suits were brought on behalf of Vietnam veterans and their families against petitioners, manufacturers of the herbicide Agent Orange, which petitioners supplied to the United States Government in compliance with military specifications for use as a defoliant. The suits alleged that exposure to Agent Orange had caused (and would cause in the future) a variety of illnesses. Despite the understandably "strong emotions these proceedings have generated" and the "grievous medical problems" experienced by many veterans and their families (*In re "Agent Orange" Prod. Liab. Litig.*,



818 F.2d 145, 147, 149 (2d Cir. 1987) ("*Agent Orange I*"), cert. denied, 484 U.S. 1004 (1988)), the courts entertaining the Agent Orange suits consistently have indicated that "the most noticeable fact [about them] is the pervasive factual and legal doubt that surrounds the plaintiffs' claims." *Id.* at 149.

The plaintiffs' factual and legal position suffered from a number of serious and common weaknesses. Among them was (1) a complete absence of evidence that exposure to Agent Orange caused the plaintiffs' illnesses, and (2) petitioners' entitlement to complete immunity under the government contractor defense. See *Agent Orange I*, 818 F.2d at 171-174. Then-Chief Judge Weinstein of the Eastern District of New York, who presided over the eventual settlement of the first round of Agent Orange litigation, thus "viewed the plaintiffs' case as so weak as to be virtually baseless." *Agent Orange I*, 818 F.2d at 151. The Second Circuit echoed that belief when it affirmed the decision approving the settlement, noting "the pervasive difficulties faced by plaintiffs in establishing liability." *Ibid.* Indeed, Chief Judge Weinstein dismissed on the merits the claims of class members who opted out of the class to pursue individual actions (see *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985)), a decision that was upheld by the Second Circuit on appeal. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988).

2. a. The first Agent Orange suit was brought in New York state court in 1978, removed to federal court, and transferred to the Eastern District of New York. Other individual and class complaints followed. In 1979, the Judicial Panel on Multidistrict Litigation consolidated the suits in the Eastern District of New York, where the litigation was assigned to then-District Judge Pratt. Ultimately, almost 600 class and individual actions became part of the Agent Orange MDL proceeding. See *Agent Orange I*, 818 F.2d at 152-153. The lead class action sought relief for a class of almost 2.5 million veterans who served in Vietnam between 1961 and 1972, including both veterans who

were then sick and the much larger group who were asymptomatic but assertedly were "at risk" of becoming ill because they had been exposed to Agent Orange. See, *e.g.*, Pl. Rep. Mem. on Class Certification (Oct. 17, 1979), JA 47-49 (taking the position that all Vietnam veterans "sustained some personal injury"). The class suit also sought relief for certain of the veterans' family members.

In 1980, Judge Pratt turned to the question whether the class should be certified. Although the defendants opposed certification, Judge Pratt, after a detailed analysis, conditionally granted the plaintiffs' request to certify a class of "all persons exposed to Agent Orange and various members of their families" – a group that expressly was understood to include both ill and asymptomatic veterans. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 787 (E.D.N.Y. 1980). See *id.* at 787-791. The court observed that, "[b]efore a class action may be maintained under Rule 23, the action must meet the prerequisites of Rule 23(a) and one set of the alternate requirements of Rule 23(b)." *Id.* at 787. Of particular importance here, Judge Pratt carefully considered the requirements of Rule 23(a)(4), recognizing that "[a]dequacy of representation depends on * * * the absence of antagonism or conflicting interests, and a sharing of interests between class representatives and absentees." *Id.* at 788. Finding adequacy and the other elements of Rule 23(a) satisfied, Judge Pratt determined that class action treatment was appropriate under Rule 23(b)(3). 506 F. Supp. at 790, 791. See *Agent Orange I*, 818 F.2d at 153.

In 1983, after Judge Pratt was appointed to the Second Circuit, Chief Judge Weinstein of New York's Eastern District assumed responsibility for the Agent Orange litigation. Because Judge Pratt had not entered a formal certification order, Chief Judge Weinstein revisited the question of class certification and – again over the defendants' objections – ultimately concluded that "in the instant litigation * * * the desirability of class certification [is] even greater than it would



be in most mass tort litigation." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 720 (E.D.N.Y. 1983). Chief Judge Weinstein specifically noted that "[t]he four prerequisites [of Fed. R. Civ. P. 23(a)] have already been carefully analyzed by the court and found to exist." *Id.* at 721. The court then concluded that certification was proper pursuant to Rule 23(b)(3) because "the affirmative defenses and the question of general causation are common to the class" and "those questions predominate over any questions affecting individual [class] members." *Id.* at 724.

Chief Judge Weinstein defined the plaintiff class broadly to include:

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides * * *. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

100 F.R.D. at 729. Again, this class was recognized by the court and the parties to include both ill and unimpaired veterans; under the plaintiffs' theory, all Vietnam veterans exposed to Agent Orange had suffered a legally cognizable "injury," even if they had not manifested symptoms.[1]

---

[1] See, *e.g.*, Tr. of Oral Arg. Before Special Master Sol Schreiber, Aug. 24, 1982 (JA 55-59 (statement by lead plaintiffs' counsel that all 2.5 million Vietnam veterans had suffered injury and were members of the class); Pl. Second Supp. Mem. on Class Definition & Supp. Mem. on Generic Causation, Sept. 12, 1983 (JA 70; see also *id.* at 71-74) (urging definition of class that "will be dispositive to all present and potential claimants"); Tr. of Oral Arg. at 46, MDL No. 381 (E.D.N.Y. Nov. 7, 1983) (Chief Judge Weinstein stating that "[a]nybody in Vietnam during this period is prospectively within the class").

Chief Judge Weinstein also ordered that notice of the pendency of the action – and of the class members' right to opt out of the suit until May 1, 1984 – be provided to the class in several ways:

- Written notice was mailed to all persons who had filed or intervened in Agent Orange actions, who were represented by counsel associated with the plaintiffs' management committee, or who were "listed on the United States Government's Veteran's Administration 'Agent Orange Registry.'" 100 F.R.D. at 729.[2]

- Plaintiffs' counsel were to arrange for announcements to be read over the national television networks and on radio stations "with a combined coverage of at least 50 percent of the listener audience in each of the top one hundred radio markets in the United States." *Id.* at 730.

- Plaintiffs' counsel were to publish the notice in two successive weeks (except in the case of monthly publications) in the nationwide edition of *The New York Times*, *USA Today*, *Time Magazine*, *The American Legion Magazine*, *VFW Magazine*, *Air Force Times*, *Army Times*, *Navy Times*, and the *Leatherneck*; in the ten largest circulation newspapers in Australia; and in the five largest circulation newspapers in New Zealand. *Id.* at 730.

- The court's clerk sent the class notice to every state governor, asking that it be referred to "any state organization created by the executive or legislative

[2] The Agent Orange Registry maintained by the Veterans Administration (now the Department of Veterans Affairs) included the records of medical examinations, diagnostic tests, and health care evaluations provided to veterans concerned about the possible effects of exposure to Agent Orange. See P. SCHUCK, AGENT ORANGE ON TRIAL 24 (1987). At the time of class certification in 1984, the registry contained information on approximately 130,000 veterans.



> branches dealing with the problems of Vietnam veterans and request[ing] that the notice be sent to all those known Vietnam veterans who may be members of the class." *Id.* at 730-731.

Chief Judge Weinstein found that this notice "is the best reasonable and practicable notice under the circumstances of this litigation." *Id.* at 731. He scheduled trial for May 7, 1984.

b. As the trial date approached, the parties engaged in "arm's length and adversarial, even fierce" settlement negotiations with the assistance of three special masters appointed by Chief Judge Weinstein. *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1436 (2d Cir. 1993) ("*Ivy/Hartman*"), cert. denied, 510 U.S. 1140 (1994); see *Agent Orange I*, 818 F.2d at 155; P. SCHUCK, AGENT ORANGE ON TRIAL 144-166 (1987). The parties reached a settlement agreement early in the morning of May 7, 1984, on the eve of trial. *Agent Orange I*, 818 F.2d at 155. The settlement provided that the defendants would pay a lump sum of $180 million into a fund to benefit the plaintiff class but did not provide for the formula to be used to distribute the settlement proceeds. See *ibid.* The settlement specified that "all members of the Class are forever barred from instituting or maintaining any action against any of the defendants * * * arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint," and also made express that "[t]he class specifically includes persons who have not yet manifested injury." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 864-65 (E.D.N.Y. 1984).

Chief Judge Weinstein, in an unprecedented outreach to the class members, then scheduled eleven days of hearings on the fairness of the settlement, to be conducted in New York, Chicago, Houston, Atlanta, and San Francisco. See 597 F. Supp. at 866. He ordered plaintiffs' counsel to mail notice of the proposed settlement and of the hearings to "all members of the class known to [them]," and also directed counsel to publish

the notice in specified general interest and armed forces newspapers. See *id.* at 866-867. Among other things, the notice indicated that "[t]he Settlement Agreement confirms that the class includes persons who have not yet manifested injury" and stated that, if the court were to approve the settlement, it would conduct further proceedings to determine the proper allocation of the settlement funds. *Id.* at 874-875.

At the fairness hearings, Chief Judge Weinstein heard from almost 500 witnesses. He also considered "hundreds of written communications from veterans, members of their families, veterans' organizations and others * * * [and] read a large part of the relevant literature, taking judicial notice of its substance." 597 F. Supp. at 748; see *Agent Orange I*, 818 F.2d at 155-156. A number of class members and their attorneys voiced concern about the provision that would be made for veterans who had not manifested symptoms, and several recommended that a subclass of objectors be certified. See, *e.g.*, JA 122-125. Chief Judge Weinstein denied this request, concluding that the views of the objectors had been taken into account and that "[n]o purpose would have been served by appointing counsel for a subclass of disappointed claimants except to increase expenses to the class and delay proceedings." 597 F. Supp. at 757.

At the close of the fairness hearings, Chief Judge Weinstein carefully reviewed and then preliminarily approved the settlement pursuant to Fed. R. Civ. P. 23(e). See 597 F. Supp. at 746-858. In finding the amount awarded to the class fair, the judge was motivated principally by his view that "the evidence presented to the court to date suggests that the case is without merit" (*id.* at 857) and that the settlement accordingly "gives the class more than it would likely achieve by attempting to litigate to the death." *Id.* at 747. In so ruling, Chief Judge Weinstein analyzed in detail the myriad and, in his view, insurmountable difficulties the plaintiffs would face in establishing liability. *Id.* at 800-850. Indeed, as is noted above (at page 2, *supra*), Chief Judge Weinstein subsequently



dismissed on the merits the claims of class members who opted out of the class. He entered a final order approving the settlement on January 7, 1985. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985), aff'd in relevant part, 818 F.2d 112 (2d Cir. 1987).

Class members subsequently moved for reconsideration. Among other things, these objectors expressly contended that "the class action representatives may have been inadequate." Mem. in Supp. of Pl. Mot. Pursuant to Rules 52(b) and 59 to Reconsider the Order of Jan. 7, 1985 (JA 144). They complained that "[n]o class representative represented class members who were deceased or who had not manifested injury"; that "[a]ll of the class representatives were living and had manifested injury"; and that "the interests of living class representatives who had manifested injury were antagonistic to the interests of those who had died and to those who had not yet manifested injury" because "[]the more money set aside for those who had died and for those who had not yet manifested injury, the less money available to those who are living and who have manifested injury." *Id.* at 144-145. Chief Judge Weinstein, after indicating that he had considered the argument and found it to lack merit, denied this motion without opinion. *Id.* at 194.

c. The court then turned to the distribution of the settlement funds. Chief Judge Weinstein conducted a public hearing on the subject – in which the defendants did not participate – where he heard from the plaintiffs' counsel, representatives of veterans organizations, and individual class members. After also receiving and "thorough[ly] reviewing" a "number of [written] submissions" (*In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1402 (E.D.N.Y. 1985); see *Agent Orange I*, 818 F.2d at 156), Chief Judge Weinstein adopted a slightly modified version of a proposal for distribution that had been offered by Special Master Kenneth Feinberg. The judge described this proposal as "an elegant solution [combining] insurance-type compensation to give as much help as possible

to individuals who, in general, are most in need of assistance, together with a foundation run by veterans with the flexibility and discretion to take care of individuals and groups most in need of help." 611 F. Supp. at 1400.

The distribution plan provided that 75 percent of the $180 million settlement fund would be distributed directly to the survivors of deceased veterans and to veterans who became totally disabled due to illness before January 1, 1995 – *i.e.*, ten years beyond the date of the settlement and more than 20 years after any possible exposure to Agent Orange. 611 F. Supp. at 1410-1412. This "compensation-based" regime did not vary according to the strength or weakness of individual claims (or of categories of claims) "because of the near impossibility of proving that any particular plaintiff's condition was caused by Agent Orange." *Id.* at 1400. Although Chief Judge Weinstein recognized that this formula would result in "[n]o payment [being] made for death or disability occurring after December 31, 1994" (*id.* at 1417), he noted that "disabilities or deaths occurring many years after service in Vietnam, or among older veterans for whom the background incidence [of illness] is higher, have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes" (*id.* at 1418); in addition, keeping the portion of the fund dedicated to cash compensation open indefinitely would preclude the possibility of meaningful payments to acutely ill veterans who were most in need of assistance. *Id.* at 1411.

Chief Judge Weinstein set aside most of the remainder of the settlement fund to support a "class assistance foundation" run by veterans that would help class members "mobilize themselves and others to deal with their medical and related problems." 611 F. Supp. at 1432. Recognizing that "[t]he majority of claimants will not meet the eligibility criteria for cash compensation under the payment program," Chief Judge Weinstein explained that class members who were not disabled "should receive some benefit from the settlement." *Id.* at 1431.



He concluded that "[t]he most practicable and equitable method of distributing benefits to this segment of the class is through funding of services" pursuant to the class assistance foundation, as opposed to "thousands of small individual payments" that would "trivialize the beneficial impact of the settlement fund on the needs of the class." *Ibid.* The foundation was broadly directed "to fund projects to help meet the service needs of the class as a whole." *Id.* at 1437.

The district court subsequently entered judgment dismissing "on the merits, with prejudice," "all claims of each and every plaintiff and member of the Rule 23(b)(3) class." This order provided that "[e]ach and every plaintiff and member of the Rule 23(b)(3) class is hereby forever barred from instituting or maintaining any action against any of the defendants" relating to "the subject matter of any of the complaints in this class action." *Ryan* v. *Dow Chem. Co.*, 618 F. Supp. 623, 624 (E.D.N.Y. 1985).

3. Objecting class members subsequently appealed. Of particular importance here, the objectors made the very argument now advanced by respondents in this case: they contended that the class should not have been certified, arguing that the class representation was inadequate because "[t]he 'injured' class representatives failed to protect the substantive rights of all of those 'not yet manifested injury' class members who will manifest injury after the year 1995 when the settlement fund is projected to be depleted." No. 84-6273, *In re "Agent Orange" Prod. Liab. Litig.*,, Reply Br. of Appellants 16 (2d Cir.) (brief of objectors to the settlement). The court of appeals specifically rejected this contention that "the diverse interests of the class make adequate representation virtually impossible" (*Agent Orange I*, 818 F.2d at 167) and upheld the settlement.[3] In reaching this conclusion, the Second Circuit

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[3] The court of appeals ordered Chief Judge Weinstein's distribution plan modified in only two respects. It held that the class assistance foundation should be administered directly by the district court rather

voiced agreement with Chief Judge Weinstein's finding that there were no significant differences among the class members because their claims had serious common weaknesses that were central to resolution of the case. *Id.* at 166-167. The court therefore held that class representation was adequate and that the class had been properly certified. *Ibid.*

The court of appeals also held that "the notice plan adopted by Chief Judge Weinstein was fully adequate under the circumstances" (*id.* at 169) and that the settlement was fair, reasonable, and adequate. *Id.* at 170-173. In reaching this latter conclusion, the court emphasized the insubstantiality of the plaintiffs' claims, observing that, in view of the serious common legal and factual barriers to recovery, plaintiffs' counsel "had good reason to view this case as having only nuisance value." *Id.* at 171; see *id.* at 170-174. The objectors subsequently sought certiorari and this Court denied review. 484 U.S. 1004 (1988).

Relying on the finality of the settlement, petitioners paid $180 million (plus accrued interest) to resolve the class members' claims. See *Ivy/Hartman*, 996 F.2d at 1429. Distribution of the settlement proceeds began in 1988 and was largely accomplished by June 1997. During that period, 52,000 class members received $196.5 million in direct cash payments. Pet. App. 9a. The eligibility criteria established by Chief Judge Weinstein ultimately resulted in fewer that one percent of class members receiving direct payments from the settlement funds. See Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund at 1, 3-4 (Sept, 24, 1997). The class assistance foundation expended an additional $71.3 million to benefit the class as a whole. Pet. App. 9a.

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than by class members, and that the fund should be managed so that the settlement moneys eventually would be consumed in their entirety. 818 F.2d at 184-186.



4. In 1989 and 1990, two years after the class settlement became final, individual veterans brought two new putative class actions (the "*Ivy/Hartman*" suits) against petitioners, alleging that they had suffered injuries caused by Agent Orange that "did not manifest themselves or were not discovered until after May 7, 1984, the *Agent Orange I* settlement date." *Ivy/Hartman*, 996 F.2d at 1430. The cases were dismissed by Judge Weinstein, who found the claims precluded by the settlement. *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 902, 918-919 (E.D.N.Y. 1991). In particular, Judge Weinstein rejected the contention that persons who developed symptoms after 1984 had not been adequately represented in the original class litigation. He acknowledged that "[o]ne can imagine many genuine conflicts of interest between two such groups [*i.e.*, symptomatic and asymptomatic class members] within a class action," but explained that "[a]ll of the courts which considered the *Agent Orange* Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund." *Id.* at 919.

The court of appeals affirmed. Concluding that "the fundamental fairness of the *Agent Orange I* settlement remains unshaken" (*Ivy/Hartman*, 996 F.2d at 1437), the court accordingly held that class members who became ill after the settlement was reached were barred from pursuing individual claims against petitioners. *Id.* at 1438.

5. a. In 1998 and 1999, five years after the Second Circuit's ruling in *Ivy/Hartman*, respondents in the current litigation filed separate individual actions against petitioners. In their complaints, respondents alleged that they had become ill due to exposure to Agent Orange in Vietnam, but that their illnesses did not become manifest until after 1994, when the portion of the Agent Orange settlement providing direct cash payments to veterans had been exhausted. See Pet. App. 9a-10a. Respondents contended that their inability to receive such payments now necessarily meant that they had not been

adequately represented at the time of the class action and therefore could not be bound by the settlement. See *id.* at 13a-14a.

The cases were transferred to the Eastern District of New York and dismissed by Judge Weinstein. Pet. App. 27a-43a.[4] He noted that, at the time of the settlement, "the court held discussions with all attorneys and anyone else who wished to be heard, those who knew they were sick, those who thought they might be sick in the future * * * . The court then approved the settlement. It was appealed to the court of appeals, which approved the settlement. That is the final decision. Whether right or wrong at that time, that is the end of the case." *Id.* at 39a. Judge Weinstein added that "[y]ou have to attack directly,

[4] This case involves two consolidated actions that present identical substantive issues. One, initiated by respondent Daniel Stephenson, was brought in federal court in the Western District of Louisiana on diversity grounds; the other, initiated by respondent Joe Isaacson, was brought in New Jersey state court, removed to federal court for the District of New Jersey, and then transferred to the Eastern District of New York. See Pet. App. 10a. Isaacson sought remand of his case to state court, arguing that one of the bases for removal, the All Writs Act, 28 U.S.C. § 1651, does not independently provide for federal removal jurisdiction; that argument was rejected both by the district court and by the court of appeals. See Pet. App. 10a, 11a-12a. After certiorari was granted in this case, however, this Court held in *Syngenta Crop Protection, Inc.* v. *Henson*, 123 S. Ct. 366 (2002), that the All Writs Act does not provide an independent basis for federal jurisdiction. In light of *Syngenta*, petitioners' view is that the Isaacson case should be remanded to the district court for a determination whether the alternative ground advanced below in support of removal – the federal officer removal provision of 28 U.S.C. § 1442 – supports the exercise of federal jurisdiction. See *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998), cert. denied, 526 U.S. 1034 (1999). This Court, of course, does have jurisdiction to decide the questions presented in the petition for certiorari by resolving Stephenson's case.



not by a collateral attack some fifteen years after judgment." *Id.* at 40a.

Judge Weinstein also noted that respondents, like "[e]very veteran[,] * * * benefited" from the $71.3 million distributed by the class assistance fund, even if respondents were not among the relatively small proportion of class members who received direct cash death or disability payments. Pet. App. 42a. As Judge Weinstein explained, the class assistance fund financed a variety of programs that, among other things, contributed substantially to the passage of federal Agent Orange legislation, which continues to provide benefits to many class members – including respondent Isaacson. *Id.* at 42a-43a.

b. On appeal, the third time was the charm; the court of appeals reversed, holding that respondents were not precluded from litigating the issue of adequate representation. Pet. App. 1a-20a. The court acknowledged that its prior decisions in *Agent Orange I* and *Ivy/Hartman* "specifically rejected an attack based on adequacy of representation." *Id.* at 6a; see *id.* at 8a-9a. The court also recognized that respondents "fall within the class definition of the prior litigation." *Id.* at 18a. The court nevertheless believed that this case required it "to determine the effect of the Supreme Court's landmark class action decisions in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), on a previously settled class action." Pet. App. at 1a-2a. Answering that question, the court concluded that those decisions "prevent applying res judicata to bar plaintiffs' claim." *Id.* at 2a.

The court of appeals first held that respondents *could* launch a collateral attack on the prior holdings that the class representation had been adequate. Notwithstanding its previous conclusion "that there was adequate representation of all class members in the original *Agent Orange* settlement," the Second Circuit stated (inaccurately, in our view) that "neither this Court nor the district court has addressed specifically the

adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds." Pet. App. 13a. In this regard, the court distinguished its decision in *Ivy/Hartman* on the ground that the illnesses of the plaintiffs in that litigation became manifest prior to the termination of direct cash payments to class members. *Id.* at 13a-14a. "Therefore," the court held, "plaintiffs' suit can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund." *Id.* at 14a. Citing this Court's decision in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), the court of appeals concluded that "[i]f [respondents] were not proper parties to th[e] [class action] judgment * * * res judicata cannot defeat their claims." Pet. App. at 16a.

The court then turned to the merits of the collateral attack on the prior determination of adequacy, finding *Amchem* and *Ortiz* dispositive. The Second Circuit read those decisions, both of which were handed down long after the Agent Orange settlement, to hold that it generally is improper for a court to certify "a class which purports to represent both present and future claimants." Pet. App. 19a. Observing that "the prior [Agent Orange] litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994," the court of appeals accordingly took *Amchem* and *Ortiz* to indicate that respondents here "were not adequately represented in the prior *Agent Orange* litigation." *Ibid.* And because the court of appeals evidently understood *Amchem* and *Ortiz* to state a constitutional rule, it went on to opine that respondents had not been "afforded due process in the earlier litigation." *Id.* at 20a. The court therefore held that respondents "were not proper parties [to that litigation] and cannot be bound by the settlement." *Ibid.*



## INTRODUCTION AND SUMMARY OF ARGUMENT

The Agent Orange class was certified nearly 20 years ago. At the time, the courts directly confronted the question whether the class was adequately represented, with the issue vigorously contested first by the defendants and then by class objectors. Two district judges and the court of appeals, keenly aware of the judicial obligation to guard against intraclass conflicts, found the representation adequate. Faced with a certified class, petitioners settled the suit, making an unallocated $180 million payment to be distributed by the district court on the express condition that class members not initiate future Agent Orange litigation.

Now, many years later, respondents have become dissatisfied with the district court's distribution plan because they fell ill at a time when it was no longer possible for them to obtain direct payments from the settlement funds. Although respondents did not opt out of the class or object to the terms of the settlement prior to payment of the judgment – and although, like all members of the class, they benefited from the activities of the class assistance foundation – respondents insist that their current inability to receive direct cash payments shows that they were not adequately represented at the time of the settlement and that, as a consequence, they should not be bound by the class judgment.

The implications of this argument are dramatic. Respondents' approach would subject petitioners to new rounds of litigation and the prospect of additional liability *after* they already have irretrievably paid a substantial settlement on the express condition that they would *not* face future lawsuits. And more generally, respondents' approach would substantially undermine the utility of the class action procedure by making it impossible *ever* to definitively determine that a class is adequately represented.

I. This outcome is worse than unfair and unwise: it is legally insupportable, for several reasons. *First*, post-judgment

developments – here, the fact that, as matters eventuated, respondents became ill after direct payments from the settlement fund had terminated – may not be used to reopen litigation. After-the-fact dissatisfaction with the outcome of a lawsuit never has been thought to justify a collateral attack on a final judgment. The court of appeals nevertheless reasoned that, at the time of class certification, veterans who would become ill after direct payments from the settlement fund ended should have been put in a separate subclass. That conclusion suffers from a fatal failure of logic; at the time of certification *all* asymptomatic class members were in precisely the same position because it was not known or knowable when, if ever, any particular veteran would become ill.

*Second*, and more fundamentally, barring respondents from relitigating adequacy of representation is fully consistent with the requirements of due process. The good-faith implementation of Fed. R. Civ. P. 23 – a rule that was applied by the courts in this case and that specifically requires, among other things, that the court itself assure the adequacy of class representation – suffices to "insure[] the protection of the interests of absent parties who are to be bound by [the judgment]." *Hansberry*, 311 U.S. at 42. At the same time, the balance of public and private interests that go into the due process equation shows that absent parties have not been denied due process when they are bound by determinations of adequacy made under Rule 23: (1) respondents' interest in relitigation is limited by the Rule 23 protections themselves, which assure that the settlement is fair to absent parties; (2) the risk that the initial determination of adequacy was incorrect is low, as is the value of relitigation; and (3) the interests both of adverse parties (who have a right to count on finality) and of the public (which would see the class action mechanism sapped of much of its utility if relitigation is permitted) weigh heavily against allowing collateral attacks on determinations of adequacy.



II. Even if collateral challenges to long-settled findings of adequacy are permissible, the Second Circuit committed fundamental errors in the way it went about conducting the new adequacy inquiry. The court assumed that the analysis used in resolving a collateral attack is identical to the one that governs on initial direct review of the adequacy determination. But that plainly is wrong, because the due process balance is dramatically different in a collateral proceeding. The claimant who seeks to avoid the binding force of a final judgment and thereby to upset settled reliance interests must make a far more powerful showing of prejudicial intraclass conflicts than does a class member challenging adequacy of representation in the initial litigation. In addition, any redetermination of adequacy must be made on the basis of the facts and law as they existed at the time of the original judgment. When viewed under the proper standards, there is no basis for setting aside the finding of adequacy made in the Agent Orange litigation nearly two decades ago.

## ARGUMENT

### I. THE PRIOR FINAL DETERMINATION THAT ALL MEMBERS OF THE AGENT ORANGE CLASS WERE ADEQUATELY REPRESENTED IN THE ORIGINAL LITIGATION IS NOT SUBJECT TO COLLATERAL ATTACK

#### A. Class Action Judgments Are Binding On All Members Of The Class And May Not Be Reopened On The Basis Of Developments Occurring After The Entry Of Final Judgment

*1. Preclusion principles apply in class litigation.* The background principles that control this litigation are not in dispute. To begin with, "[a] fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent

suit between the parties or their privies.'" *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pac. R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897) (ellipses in original)). As a consequence, "the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination" (*Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982)), and such a judicial decision "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 398 (1981). See, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332-333 (1979).

This preclusion of collateral litigation "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Moitie*, 452 U.S. at 401 (citation and internal quotation marks omitted). Indeed, rules of issue and claim preclusion are "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana*, 440 U.S. at 153. The important social values those rules advance have often been rehearsed: barring collateral litigation protects parties against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-154. See, *e.g.*, *Kremer*, 456 U.S. at 467 n.6; *Allen* v. *McCurry*, 449 U.S. 90, 94 (1981); *Parklane Hosiery*, 439 U.S. at 326. This "'public policy'" that "'there be an end of litigation'" is so fundamental that even matters going to the court's jurisdiction – and, thus, to its very authority to decide the case – once "fully and fairly litigated and finally decided" shall "'be considered forever settled between the parties.'" *Durfee* v. *Duke*, 375 U.S. 106, 111 (1963) (citations omitted). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940).



There is no doubt that this principle of finality applies with full force in the class action context. "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). This means that "[a] judgment in favor of either side [in a class action] is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment." *Ibid.* See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 801 (1985); *Hansberry*, 311 U.S. at 41-42. In particular, in an action under Fed. R. Civ. P. 23, "'[a]ll members of the class * * * are bound by the judgment entered in the action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion.'" *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996) (citation omitted). See *Devlin* v. *Scardelletti*, 122 S. Ct. 2005, 2011 (2002) ("appealing the approval of a settlement is [a class member's] only means of protecting himself from being bound by a disposition of his rights he finds unacceptable").

On the face of it, those principles would appear to dispose of this case. Respondents concededly are members of the Agent Orange class certified by Judges Pratt and Weinstein, and therefore are bound by the class judgment. The adequacy of class representation (and, more broadly, the propriety of class certification) was contested and decided both at the time of preliminary class certification in 1980 and at the time of final certification in 1983. See pages 4-5, *supra*. Adequacy of representation was contested and resolved again when objectors sought reconsideration of the settlement. See page 9, *supra*. And it was raised, contested, and expressly resolved by the Second Circuit on appeal in *Agent Orange I*. See pages 11-12, *supra*. The issue of adequate representation therefore should be "considered forever settled between the parties."

*2. Post-settlement developments may not be used to reopen class judgments.* The court of appeals nevertheless held that

respondents were not bound by the class judgment. In the court's view, class members who did not manifest illness until after 1994 (the year direct cash payments from the settlement fund terminated) may not be treated as "proper parties" to the class action because "there has been no prior adequacy of representation determination" with regard to this limited subclass of veterans "whose claims arise after depletion of the settlement fund." Pet. App. 14a. Starting from that hypothesis, the court concluded that the holdings of *Amchem* and *Ortiz* permitted reexamination of the prior judgment as to adequacy. There is however, a fatal error in this conclusion.

a. The Second Circuit's essential reasoning was that respondents *must* not have been adequately represented because, as events ultimately turned out, they did not become ill until after 1994 and therefore could not recover direct cash payments from the settlement fund. But this holding runs afoul of basic preclusion principles. It has never been thought that after-the-fact dissatisfaction with the outcome of litigation justifies a collateral attack on a long-final judgment; after all, allowing such an attack "'would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avoid.'" *Moitie*, 452 U.S. at 398-399 (citation omitted). Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992) (modification of a consent decree ordinarily "should not be granted where a party relies upon events that actually were anticipated at the time it entered into [the] decree"). Indeed, the entire point of the preclusion principle described above is that parties do *not* get a second bite at the apple simply because they are unhappy about how the judgment played out over time. That is no less true of class actions than of other forms of litigation.

The court of appeals compounded this basic legal mistake with a logical error. It concluded that class members who became ill after 1994 should have been put in a subclass (or let out of the class action altogether) because they necessarily were



disadvantaged by the settlement relative to those who manifested symptoms earlier. But this reasoning is unsound. The court did *not* say that *all* asymptomatic class members had been inadequately represented, or that it was impermissible to certify a unitary class consisting of both currently ill and (some limited group of) asymptomatic veterans; to the contrary, the court accepted as correct its previous holding in *Ivy/Hartman* that class members who had not been ill at the time of settlement in 1984, but who developed symptoms between 1984 and 1994, *had* been adequately represented and therefore *were* bound by the judgment. See Pet. App. 13a-14a. Yet at the time of class certification and settlement in 1983 and 1984, it was not known – *and was not knowable* – which veterans would become ill prior to 1994, which would become ill after 1994, and which would never become ill at all. This means that, at the time of settlement in 1984, respondents were in precisely the same position as all other "future claimants" because each operated behind a "'veil of ignorance,'" not knowing "where [he or she] would end up." *Uhl* v. *Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 986 (7th Cir. 2002) (Diane Wood, J.). Thus, if it was permissible for many asymptomatic veterans to have been in the class along with the then-impaired, as the court of appeals conceded to be the case, the distinction drawn by the court simply makes no sense.

b. In addition, the court of appeals clearly was wrong in its related view that the finality of a judgment is affected by subsequent changes in the substantive law. Here, the Second Circuit believed that this Court's decisions in *Amchem* and *Ortiz* undermined the correctness of the 1980 and 1983 decisions to certify the Agent Orange class. See Pet. App. 1a-2a, 17a-20a. But even if the court of appeals were right in its reading of *Amchem* and *Ortiz* (a point that we address below), those decisions cannot provide a basis for reopening a holding that had become final many years earlier. The preclusive effects of a final judgment are not "altered by the fact that the

judgment may have been wrong or rested on a legal principle subsequently overruled in another case. * * * A judgment merely voidable because based on an erroneous view of the law is not open to collateral attack, but may be corrected only by a direct review * * * ." *Moitie*, 452 U.S. at 398.[5] When the Second Circuit posed the problem before it as "determin[ing] the effect of the Supreme Court's landmark decisions in [*Amchem* and *Ortiz*] on a previously settled class action" (Pet. App. 1a-2a), the answer therefore should have been elementary: those decisions *should have no effect at all* on cases that had gone to final judgment many years before. For that reason alone, the decision below should be set aside.

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[5] It "has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule." *Teague* v. *Lane*, 489 U.S. 288, 308 (1989) (opinion of O'Connor, J.). See *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 758 (1995) (new legal rules "do not apply to cases already closed"); *Harper* v. *Virginia Dep't of Transp.*, 509 U.S. 86, 97 (1993) (rule of law announced by the Court "must be given full retroactive effect in all cases *still open on direct review*") (emphasis added); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) ("retroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata or by statutes of limitations or repose, a new rule cannot reopen the door already closed"). The conclusion that changes in the law do not justify disturbing settled civil judgments also draws force from decisions holding that Fed. R. Civ. P. 60(b)(6) generally does not allow final judgments to be revisited on the basis of subsequent decisions that state new rules, even when the interests at stake are very substantial. See *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950). See also, *e.g.*, *Travelers Indem. Co.* v. *Sarkisian*, 794 F.2d 754, 757 (2nd Cir. 1986); *United States* v. *Woods*, 986 F.2d 669, 681 (3rd Cir. 1993); *Blue Diamond Coal Co.* v. *Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir.), cert. denied, 122 S. Ct. 643 (2001).



### B. Barring Respondents From Relitigating Adequacy Of Representation Is Fully Consistent With Due Process: The District Court Long Ago Afforded Respondents The Necessary Process By Conducting The Analysis Required By Rule 23

The court of appeals' principal focus was on the distinction between class members who manifested illness after 1994 and those who became ill earlier. But the court below may have meant to hold more broadly – as respondents appear to argue – that absent class members *always* may collaterally attack the adequacy of representation by asserting that they *had not been adequately represented when the original adequacy determination was made*. The implication of this extraordinary argument is that it is never possible to settle definitively that a class is adequately represented because ranks of absent class members may come forward one after another to argue that the persons who litigated adequacy the last time did not adequately represent *them*. On this view, a finding of adequacy is essentially advisory as to absent parties and may be continually challenged on due process grounds by disgruntled class members. This is by no means a theoretical prospect, as this case shows; it will almost always be possible for class members to claim that they were differently situated from others in the class in some way that, in hindsight, could appear significant.[6]

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[6] Here, for example, the distinction between those who became ill pre- and post-1994 – which is the focus of respondents' argument – is by no means the only, or even the most obvious or significant, distinction between class members drawn by Chief Judge Weinstein's allocation formula. Others include the distinction between veterans who are completely disabled (who were eligible for settlement funds) and those who were ill but not disabled (who were not), as well as myriad related eligibility distinctions the judge imposed. Under respondents' theory, all of those distinctions could form the basis for an adequacy challenge.

But this approach, too, is misguided. The determination that a case may proceed as a class action, if made in accordance with Fed. R. Civ. P. 23, binds all members of the defined class. Of course, any judgment may be attacked if enforcing it would violate due process. But "this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted[] fairly insures the protection of the interests of absent parties who are to be bound by [the judgment]." *Hansberry*, 311 U.S. at 42. And here, implementation of Rule 23's procedures (of which Rule 23(a)(4) is a crucial component) provided respondents with all the process due by "fairly insur[ing] the protection of the interests of absent parties" so far as the determination of adequacy is concerned.

*1. Good-faith application of Rule 23 in a class action ordinarily ensures that binding absent class members to the judgment – and to the determination of adequacy that is a necessary part of that certification – comports with the Due Process Clause.* It is, to be sure, a fundamental tenet of due process that a party may not be bound by a judgment in a representative suit if he or she was not "adequately represented" in the proceedings leading to that judgment. *Richards* v. *Jefferson County*, 517 U.S. 793, 794 (1996). See, *e.g.*, *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 41-42. But having stated that principle, it remains necessary to determine what constitutes "adequacy" in a given context and to identify the considerations that make it fundamentally fair, and thus permissible, to bind an absent party. The Court's decisions provide the answer to that inquiry: an absent party may be bound when the procedures in place provide a reasonable (or "adequate") degree of assurance that his or her interests were taken into account by the decision-maker in the original litigation. That does not mean that the absent party necessarily must have received actual notice of the proceedings, or that the party must actually have appeared and been heard by the court in person, or that the party's views must have been



presented in just the same way that they would have been argued had the party been able to appear in person. Instead, what *is* necessary, and what justifies binding the absent party, is a procedure that operates to protect the interests of that party in court.

a. On the specific question in this case – whether the "procedure adopted[] fairly insure[d] the protection of the interests of absent parties" regarding adequacy of representation – the good-faith implementation of the requirements of Rule 23 *did* provide the required protections, and thus accorded absent class members all the process that was due. Rule 23 was written for the precise purpose of providing the procedural safeguards that would justify both the treatment of the case as a class action and the imposition of a judgment binding on all class members. See, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974); cf. *Amchem*, 521 U.S. at 614-615, 621. As Professors Kahan and Silberman accordingly have explained, "[t]he whole point of the class action procedure – and what distinguishes it from permissive intervention – is its basic premise that a judgment does have binding effect on absent class members who are designated as such through the class action certification procedure of Rule 23 or its state counterparts." Kahan & Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. REV. 1193, 1202 (1998).

Of particular importance here, Rule 23(a)(4) mandates an inquiry designed to ensure that the interests of all class members are adequately represented and are sufficiently cohesive to justify treatment of the case as a class action. A district judge may not enter a default judgment in favor of adequacy, or presume that the class representatives are sufficient when adequacy is not disputed. Instead, Rule 23(a)(4) requires the judge "to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative" and to insist on "actual, not presumed, conformance with Rule 23(a)." *General Tel. Co. of the*

*Southwest* v. *Falcon*, 457 U.S. 147, 160 (1982). The leading commentators in this area therefore have observed that, even when there is "no adversarial litigation of adequacy, the court itself has an obligation to make the finding of adequate representation"; "federal class action procedures in effect appoint the court as guardian of the interests of absent class members to ensure adequate representation." Kahan & Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 264, 268. This is an "independent obligation * * * imposed on the court" (Kahan & Silberman, *The Inadequate Search for "Adequacy" in Class Actions: a Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 771 (1998)), which obligates the judge "to protect the interests of the unnamed class members." 7A C. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1765 (3d ed. Supp. 2000).[7]

Moreover, it must be assumed that judges will faithfully fulfill this responsibility. In a related context, the Court has indicated that, "[i]n assessing what process is due * * *, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs" (*Mathews* v. *Eldridge*, 424 U.S. 319,

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[7] See, *e.g.*, *Malchman* v. *Davis*, 706 F.2d 426, 433 (2d Cir. 1983) (district court is obligated to "make an independent evaluation of whether the named plaintiffs were adequate representatives of the class"); *Walsh* v. *Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The court was required to * * * consider whether class counsel provided fair and adequate representation to the class as a whole"); *Movement for Opportunity & Equal.* v. *General Motors Corp.*, 622 F.2d 1235, 1254 (7th Cir. 1980) (court "has a duty * * * to protect the potential members of the class" which "can only be done by assuring adequate representation of their interests"); see also *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 279-280 (7th Cir. 2002) (Posner, J.) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class * * *.").



349 (1976)); that presumption surely is at least as true of Article III judges. Rule 23(a)(4) thus establishes the class action setting as one in which the judge necessarily *does* make a "special effort 'to protect the interests of the [absent] plaintiffs.'" *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167 (1999) (quoting *Richards*, 517 U.S. at 802). For this reason, as former Chancellor Allen has explained, "[f]undamental fairness to class members does not require" that they be permitted to attack class judgments collaterally because "[a] class member in a Rule 23(b)(3) class action is afforded due process of law by the conscientious application by the court of the requirements of Rule 23 * * * ." Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149, 1160 (1998).

b. This conclusion that implementation of Rule 23's procedures *itself* ordinarily assures due process for absent class members regarding the adequacy determination draws strong support from the Court's analysis in *Shutts*. Addressing a Kansas class certification rule that was, in relevant part, identical to Fed. R. Civ. P. 23, the Court noted:

> A plaintiff class * * * cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest.

472 U.S. at 809. Given the trial court's obligation to engage in such an inquiry and to "protect [the absent class member's] interests" (*ibid.*), the Court added, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Id.* at 810.

As Judge O'Scannlain recently explained for the Ninth Circuit, this discussion in *Shutts* plainly "implies that [collateral

attack on the determination of adequacy] is unwarranted by emphasizing that the certifying court is charged with protecting the interest of the absent class members." *Epstein* v. *MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999). "Simply put," under the *Shutts* analysis "the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal * * * and by direct review in the United States Supreme Court." *Ibid.* See Kahan & Silberman, 73 N.Y.U. L. REV. at 781-782. Thus, "*Shutts* contemplates that the initial forum should make a finding of 'adequate representation' * * *. So long as this finding is made and the procedures for making it are fair" – as Rule 23's procedures surely are – "the substance of the finding itself is not subject to collateral attack." *Id.* at 771.

That conclusion also is wholly consistent with decisions like *Hansberry*, in which the Court held that absent parties were not bound by prior judgments; in those suits, the courts were *not* subject to procedural requirements obligating the judge to ensure the propriety of the class-action mechanism or the adequacy of representation. *Hansberry* itself, the decision principally relied upon by the court below, purported to be a representative action (see 311 U.S. at 39), but *Hansberry* was litigated long before adoption of the current version of Fed. R. Civ. P. 23 and its state-court counterparts. The absent class members there received *none* of the protections accorded respondents and other unnamed class members under Rule 23: the *Hansberry* trial court was under no obligation to, and did not in fact, take any steps either to ensure the adequacy of the class representation or to provide notice to absent class members. See 311 U.S. at 38-40, 44-46. Just the opposite is true in suits proceeding under Rule 23.[8]

[8] Similarly, *Richards* and *South Central Bell* were not representative suits at all; notice was not provided to absent parties in those cases and "there is no reason to suppose that the [first] court took care to protect the interests" of the parties subsequently said to be bound by the first judgment. *Richards*, 517 U.S. at 802. See *South Cent. Bell*, 526 U.S. at 167-168.



c. Indeed, the Court has long made clear that the focus of the due process inquiry in this setting must be on the *procedures* used to ensure that the interests of absent class members are taken into account, rather than on the particulars of the prior litigation. As we have noted, *Hansberry* emphasized that courts must look to "the *procedure adopted*" to "insure[] the protection of the interests of absent parties." 311 U.S. at 42 (emphasis added). Accord *Kremer*, 456 U.S. at 481; *Montana*, 440 U.S. at 164 n.11. Again in the Ninth Circuit's words, under this analysis "[d]ue process requires that an absent class member's right to adequate representation be protected by the adoption of the *appropriate procedures* by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review." *Epstein*, 179 F.3d at 648 (emphasis added).

This focus on what the procedures in place require courts to do, rather than on the merits of the particular decision a class member subsequently seeks to attack, is central to the due process analysis. The Court has held in a variety of contexts that

> the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process *as applied to the generality of cases*, not the rare exceptions."

*Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985) (quoting *Mathews*, 424 U.S. at 344) (emphasis added). "'[T]he criterion is not the possibility of conceivable injury but the just and reasonable character'" of the process

provided. *Dusenbery* v.*United States*, 122 S. Ct. 694, 701 (2002) (quoting *Mullane* v. *Cent. Hanover Bank*, 339 U.S. 306, 315 (1950)). "'Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done.'" *Mullane*, 339 U.S. at 319 (citation omitted).

*2. The courts determined in accordance with Rule 23 that the Agent Orange suit was properly maintained as a class action and that class representation was adequate.* a. Here, it is not disputed that the district and appellate courts *did* conscientiously apply the Rule 23 procedures. Judges Pratt and Weinstein engaged in the analysis mandated by Rule 23(a)(4), fully aware of their independent obligation to guard against intraclass conflicts and guarantee adequate class representation. In so doing, the courts were, as Chief Judge Weinstein noted, "fully cognizant of the conflict arguments now hypothesized by" respondents and took those arguments into account when the determination of adequacy was made. *Ryan*, 781 F. Supp. at 919. In addition, Chief Judge Weinstein further implemented Rule 23 by requiring provision of the "best reasonable and practicable notice" available, by affording class members an opportunity to opt out of the litigation, and by assuring that the settlement was fair. See pages 6-9, *supra*. The adequacy of class representation and notice was then upheld on appeal by a court that itself closely analyzed and sought to implement the controlling Rule 23 standards. See pages 11-12, *supra*. Given the unquestioned fairness of Rule 23's procedures, those decisions may not be second-guessed now.

b. Moreover, the case for preclusion is especially strong here because the issue now pressed by respondents was "'actually litigated and adjudged'" after it was raised by persons who were situated identically to, and who had exactly the same interests as, respondents. *Montana*, 440 U.S. at 157



(citation omitted).[9] After the settlement was approved but when direct review was still available, dissatisfied class members argued before Chief Judge Weinstein that the named plaintiffs and their lawyers did not adequately represent unnamed class members whose symptoms were not yet manifest. He rejected that argument. See page 9, *supra*. Objectors then advanced the same argument (as well as the argument that class notice was inadequate) on direct appeal from the settlement and were rebuffed by the Second Circuit. See pages 11-12, *supra*. See generally *First Alabama Bank of Montgomery, N.A.* v. *Parsons Steel, Inc.*, 825 F.2d 1475, 1486 (11th Cir. 1987) ("the preclusive effect of a judgment is determined by the decision of the appellate court") (citing 1B J. MOORE, MOORE'S FEDERAL PRACTICE § 0.416[2], at 518-19 (2d ed. 1984)).

In these circumstances, the interests of respondents were "protected, in significant measure," by objectors who "advanced objections shared by the large class of similarly situated persons." *Dusenbery*, 122 S. Ct. at 705 (Ginsburg, J., dissenting). See *Mullane*, 339 U.S. at 319 (notice received by some class members "is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all"). And we can be confident that the courts entertaining the original Agent Orange litigation not only were obligated by Rule 23(a)(4) to consider the significance of potential conflicts between ill and asymptomatic class members, but *did in fact*

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[9] Of course, for reasons we have addressed (at 27, *supra*), it would have been impossible for contemporaneous objectors to argue (as do respondents now) that they were members of a subclass that would not become ill until after 1994. Objectors did expressly contend, however, that class representation must have been inadequate because "there was a sacrificing of the claims of those class members whose symptoms have not appeared: those whose injuries manifest after 10 years receive nothing no matter how horrendous their future suffering may be." *In re "Agent Orange" Prod. Liab. Litig.*, No. 84-6273 (2d Cir.), Master Br. of Appellants 54.

take into account and reject the possibility of such conflicts. Because it is thus clear that the procedural protections put in place for the benefit of absent class members came into play, there is no basis for allowing relitigation of class certification.

### C. The Balance of Public And Private Interests Further Demonstrates That Respondents' Collateral Attack On Adequacy Should Not Be Allowed

For the reasons we have explained, good faith compliance with the Rule 23 procedures, even viewed in isolation, must be understood fairly and reasonably – and thus permissibly – to safeguard the interests of absent class members regarding the determination of adequacy. But the case for preclusion here is stronger than that. As the Court has indicated repeatedly, determining the process due in given circumstances requires achieving a "balance" of private and public interests. *Mullane*, 339 U.S. at 313-314. See also, *e.g*, *Dusenbery*, 122 S. Ct. at 701; *Walters*, 473 U.S. at 320-321; *Mathews*, 424 U.S. at 334-335. "At some point the benefit of an additional safeguard * * * in terms of increased assurance that the [governmental] action is just, may be outweighed by the cost." 424 U.S. at 348. The factors that generally go into this balance are familiar: they include the nature and significance of the private interests at stake, the risk of error and the probable value (if any) of additional safeguards, and the competing interests of the public and other affected parties. *Id.* at 334. See, *e.g.*, *Gilbert* v. *Homar*, 520 U.S. 924, 931 (1997); *Connecticut* v. *Doehr*, 501 U.S. 1, 10-11 (1991); *Walters*, 473 U.S. at 321. Here, given the specific circumstances of this case, and reviewing the full range of the relevant procedural due process considerations, there can be no doubt that binding respondents to the Agent Orange judgment conforms with due process.

*1. The protected interest is limited.* Respondents' interest in adequate class representation to ensure that their rights are safeguarded is important. But here, that interest is, in a significant respect, accounted for by the Rule 23 protections



themselves. Unnamed class members in Rule 23(b)(3) class actions are permitted to opt out of the class; class members who neither object to certification nor opt out have diminished grounds to assert that they were prejudiced by the way that the case was resolved.[10] In addition, when class action litigation is resolved by settlement, Rule 23(e) requires the district court to determine whether the settlement is fair to class members, reducing the likelihood that the class action judgment denied absent class members something of value.

These considerations are illustrated here. Respondents could have chosen to, but did not, opt out of the class. And the district court undertook exceptionally thorough efforts in conducting the fairness inquiry, concluding that the settlement was fair and reasonable only after holding eleven days of hearings in five cities and hearing from almost 500 witnesses. See pages 7-8, *supra*. And, it may be added, prior Agent Orange litigation demonstrates that, even if respondents prevail in their adequacy challenge, their ultimate prospect of success in subsequent litigation on the merits is very small. The private interest here therefore must be regarded as limited.

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[10] Rule 23, of course, requires that the class receive adequate notice. The Due Process Clause, however, does not require that all absent class members receive actual notice (see, *e.g.*, *Mullane*, 339 U.S. at 317-318; *Dusenbery*, 122 S. Ct. at 701; *id.* at 707 (Ginsburg, J., dissenting)), and for purposes of this proceeding the notice to the class must be regarded as constitutionally adequate. As noted above, Chief Judge Weinstein determined that the notice provided was "the best reasonable and practicable notice under the circumstances of this litigation" (100 F.R.D. at 731), a determination upheld by the court of appeals. *Agent Orange I*, 818 F.2d at 169. The court below nevertheless mused (without actually deciding) that respondents "likely received inadequate notice" under *Amchem* (Pet. App. 19a n.8), but as with respondents' attempt to relitigate the question of adequacy of representation, the final judgment that notice was adequate also is not subject to collateral attack.

*2. Given existing protections, both the risk that the initial determination of adequacy was incorrect and the value of relitigating adequacy are low.* At the same time, for the many reasons addressed above, Rule 23, with its specific requirement under Rule 23(a)(4) to consider adequacy of representation, substantially minimizes the risk that class representation will be inadequate, thus reducing the need for additional safeguards. By the time a collateral attack is launched, class representation already has been found adequate in an initial round of litigation by district and appellate courts that employed procedures the "fairness and reliability" of which there is no basis to doubt. *Mathews*, 424 U.S. at 343. Nor, absent extraordinary circumstances like collusion (which is not even alleged here), is there any reason to believe that allowing *re*litigation of the issue would add much value in protecting against error; after all, "there is no *a priori* reason to believe that the determination of (a lack of) adequate representation in a collateral attack is more likely to be correct than the determination of (the presence of) adequate representation in the initial action." Kahan & Silberman, 73 N.Y.U. L. REV. at 779.

Again, the force of these general considerations is made manifest by the record here. The district court and the Second Circuit expressly recognized their obligation to insure that class representation was adequate and free from conflicts. That determination was confirmed by the *Ivy/Hartman* litigation. And the only new consideration relied upon by the court below – the fact that respondents ultimately became ill after 1994 – improperly takes into account facts ascertainable only by hindsight that should be irrelevant to the adequacy of representation originally received by class members. There accordingly is no basis on which to conclude that additional safeguards are necessary for persons in respondents' position.

Moreover, the court of appeals' decision ignores the fact that *all* class members, including respondents, benefited from the settlement. *All* veterans, impaired and asymptomatic, received meaningful and continuing benefits through the work



of the class assistance foundation. *Every* veteran who was asymptomatic in 1984 also received something else of value – a kind of "term insurance policy" that would pay the veteran direct benefits (of the sort received by those veterans who received immediate payments) if he or she subsequently satisfied the eligibility criteria established by Chief Judge Weinstein. *All* unimpaired veterans received precisely the same "insurance policy" and, so far as was then known, all stood precisely the same chance of collecting on it.

*3. Most significantly, the interests both of adverse parties and of society weigh heavily against allowing collateral attack on determinations of adequacy.* a. On the other side of the balance, defendants like petitioners in this case have compelling interests in the finality of class action judgments that are themselves entitled to protection under the Due Process Clause. See *Peters* v. *National R.R. Passenger Corp.*, 966 F.2d 1483, 1487 (D.C. Cir. 1992); see generally RESTATEMENT (SECOND) OF JUDGMENTS § 74 cmt. c, f (1982). In this case, for example, petitioners vigorously contested the propriety of class certification – by, among other things, challenging the adequacy of the class representatives – throughout the lengthy district court litigation. See pages 4-5, *supra*. After the court nevertheless held the class representatives adequate and certified the class over petitioners' objection, petitioners settled the class claims on the express condition that all absent class members (including the then-asymptomatic) would be bound. When the judgment became final, petitioners paid the class almost $200 million. All class members, including respondents, have benefited at least indirectly from those payments. Needless to say, in such a setting defendants have "a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata* just as [the defendants are] bound." *Shutts*, 472 U.S. at 805.

These facts, which are not unusual for class litigation, illustrate what Judge Posner described for the Seventh Circuit as "[t]he practical wisdom" of the rule against collateral

litigation. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998). After all, as Judge Posner asked (rhetorically), when defendants have paid a huge sum to the class and certification is then belatedly challenged, "[a]re they [then] to go around to all [the] class members whom they have paid and ask for their [money] back so that th[e] litigation can return to its starting point?" *Ibid.* The genie, of course, cannot be put back in the bottle. It therefore is manifest that, when the question of adequacy has been litigated in good faith and decided against them, defendants would be placed in an impossible bind if they could not rely on the finality of an apparently definitive judgment. And when defendants have paid the plaintiff class in reliance on the judicial determination, it would be fundamentally unfair to apply "[a] rule that allows the defendant's settled expectation in the finality of litigation to be disturbed." *Peters*, 966 F.2d at 1487.

b. A related consideration also militates powerfully against collateral litigation here: the public and societal costs of allowing repeated challenges to the determination of adequacy would be immense. As noted above, the preclusion rules that respondents seek to circumvent generally "serve[] vital public interests." *Moitie*, 452 U.S. at 401. As a consequence, the decision below runs headlong into the understanding that "'[p]ublic policy dictates that there be an end of litigation.'" *Ibid.* (citation omitted).[11]

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[11] This conclusion draws considerable support from Fed. R. Civ. P. 60(b), which specifically identifies the circumstances in which it is permissible to reopen final civil judgments. In most situations, that rule imposes a one-year limit on moving to challenge a judgment, even where the basis for the challenge is "fraud of an adverse party." Fed. R. Civ. P. 60(b)(3). The courts have applied these limits strictly, explaining that collateral attack, "especially in civil cases, is disfavored because of the social interest in expedition and finality in litigation." *Bell* v. *Eastman Kodak Co.*, 214 F.3d 798, 800-801 (7th Cir. 2000) (Posner, J.). See *Ackermann*, 340 U.S. at 211-212; 11 C. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2857, at 260



Rule 23 itself makes clear that this policy takes on a compelling character in the class action context. As the Court has recognized, "'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" *Falcon*, 457 U.S. at 155 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979)). But the approach advanced by respondents would eliminate those efficiencies and substantially undermine the utility of the class action procedure. That approach would make the courts' determination of adequate representation essentially advisory, so far as absent class members are concerned; although the defendant would be bound by a finding that the class representatives were adequate, dissatisfied class members always would be able to come forward, insist that they had not been adequately represented at the time of certification, and relitigate the question whether the class should have been certified.

The pernicious consequences of such a rule are obvious. It would "create the potential for multiple and wasteful litigation on the issue of 'adequacy of representation,' and [would] result in a new kind of forum shopping in the class action context." Kahan & Silberman, 73 N.Y.U. L. REV. at 766. Such "multiple determinations of the same issue [would] undermine the very efficiencies sought to be achieved by the class action mechanism." *Id.* at 779. And the threat of such litigation, with the attendant possibility of a court permitting a new civil action (as the Second Circuit now has), would make it significantly more difficult for parties to settle class action lawsuits; defendants would face the prospect of resolving the case and paying out on the judgment, only to confront never-ending

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(2d ed. 1995) (courts "have administered Rule 60(b) with a scrupulous regard for the aims of finality"). Rule 60(b)(6), the Rule's catch-all provision, is reserved for cases involving "extraordinary circumstances" *other* than those identified in the preceding clauses of the Rule. *Id.* § 2864, at 365. See *id.* at 368 (citing cases).

litigation brought by innumerable class members many years later. See *Peters*, 966 F.2d at 1487; Kahan & Silberman, 73 N.Y.U. L. REV. at 779; cf. *Rufo*, 502 U.S. at 389 (changing consent decrees retroactively would "serve as a disincentive to negotiation of settlements"). As former Chancellor Allen put it:

> If every member of the class who does not actually appear in a class suit prior to judgment is able to trigger a review of the quality of the efforts of those representing the class, we shall have, insofar as class actions are concerned, reinvented the problem of inefficiency and second guessing that is solved by the rule of finality and recognition of judgments. Why should the law compel that result?

Allen, 73 N.Y.U. L. REV. at 1159-1160.

Against this background, "[i]t would take an extraordinary showing of probability of error under the present system – and the probability that [permitting relitigation of adequacy] would sharply diminish that possibility – to warrant a holding that [binding respondents to the judgment] denies claimants due process of law." *Walters*, 473 U.S. at 326. Given the considerable procedural protections already afforded members of the Agent Orange class, respondents cannot make this extraordinary showing. Indeed, the substantial costs that relitigation of adequacy would impose on petitioners and the public alike make it certain that "'the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.'" *Moitie*, 452 U.S. at 402 (citation omitted). See *Shutts*, 472 U.S. at 814 (due process does not require sacrificing "obvious advantages in judicial efficiency * * * for the protection of the *rara avis*"). Given the "vital interest of the State" in bringing litigated issues "to a final settlement," "[a] construction of the due process clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, 339 U.S. at 313-314.



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It is common ground between the parties in this case that "adequate representation" is essential to the fairness of the class action mechanism. Here, however, respondents' interests *were* fully and adequately protected by implementation of the procedural guarantees of Rule 23, including specifically the adequacy requirement of Rule 23(a)(4). In ignoring those safeguards and demanding an entire new round of litigation so that they may revisit a question that was settled long ago, respondents blind themselves to the principle "'that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection.'" *Walters*, 473 U.S. at 321 n.9 (quoting Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975)). That point has been reached in this case.

## II. IF ADEQUACY OF REPRESENTATION MAY BE REEXAMINED AFTER FINAL JUDGMENT, THE INQUIRY MUST MAKE USE OF STANDARDS THAT TAKE ACCOUNT OF THE COLLATERAL NATURE OF THE NEW REVIEW

For the reasons set out above, a collateral attack of any kind on the long-settled adequacy determination made by the courts in *Agent Orange I* is impermissible. But even if respondents *were* permitted to seek a redetermination of the adequacy of class representation, the Second Circuit nevertheless committed fundamental errors in the way it conducted that inquiry. The court wholly failed to recognize that the collateral nature of respondents' attack has a bearing on the applicable due process analysis. And the court compounded its error when, instead of basing its decision on the facts and law as they existed at the time of the original judgment, it took into account factual and legal developments that long post-dated class certification and settlement. For these reasons as well, the decision below should be reversed.

### A. Respondents' Attacks On The Determination Of Adequacy Do Not Satisfy The Standards That Apply On Collateral Review

*1. The collateral nature of the review affects the due process inquiry.* Any collateral attack on the adequacy of class representation, if permissible at all, must be addressed to the question whether it would deny absent class members due process *now* to bind them to the prior determination of adequacy. See, *e.g.*, *Shutts*, 472 U.S. at 811-812; *Kremer*, 456 U.S. at 482; *Hansberry*, 311 U.S. at 37. Under the Second Circuit's approach, however, any showing that the class representation should have been held constitutionally inadequate on *direct review* also suffices to have the judgment as to adequacy set aside on a *collateral attack*. That approach is incorrect. Prior to final judgment, the due process question is whether the interests of the class representatives are closely enough aligned with those of the absent parties for it to be fair for the former to speak for the latter; after judgment, the quite different question is whether due process requires the reopening of long-closed litigation.

Here, respondents brought their due process challenge more than ten years after the original Agent Orange judgment became final, after the adequacy of representation had been definitively resolved (twice, as it happens) by the district and appellate courts, and after petitioners had entered into a settlement and irretrievably paid the judgment in reliance on those seemingly closed judicial determinations. These changes in "time, place and circumstances" must weigh heavily in the due process balance. *Mathews*, 424 U.S. at 334 (internal quotation marks and citation omitted). Indeed, the Court has made just that point in the closely analogous context of a collateral due process attack on a criminal conviction that advances a claim of "actual innocence": "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality * * * and the enormous burden that having to retry such cases based on often stale



evidence often would place on the States, the threshold showing [to obtain relief on this ground] would necessarily be extraordinarily high" – far higher than the showing necessary to obtain relief by asserting "actual innocence" on direct review. *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993). Cf. *Factor VIII or IX Concentrate Blood Prod. Litig.*, 159 F.3d at 1019 (emphasis added) (noting that "[t]he principle that jurisdictional defects may be noticed at any time is limited * * * by the equally important principle that litigation must have an end," so that "[a]fter a case has become final by exhaustion of all appellate remedies, only an *egregious* want of jurisdiction will allow the judgment to be undone").

The same conclusion – that the claimant must make a different and more powerful showing to establish a due process violation in collateral civil proceedings – is compelled by the factors customarily considered when striking the due process balance. *First*, for reasons suggested above (at 35, *supra*), respondents' interest in complaining about the adequacy of class representation is limited by the Rule 23 procedures. *Second*, the risk of error is diminished in collateral proceedings because full appellate review already has confirmed that class representation was adequate. *Third*, and perhaps most significantly, *petitioners'* interest in the finality of the Agent Orange settlement, and the more general public interest in the finality of judgments, does not come into play at all on direct appeal but is of overwhelming importance at the time of collateral review. See pages 37-39, *supra*. For all of these reasons, a class member who seeks to establish a due process "adequacy" violation in collateral proceedings must clear a far higher bar than does an objector who advances a similar complaint during the course of the original litigation.

*2. Respondents have not demonstrated the actual, prejudicial intraclass conflict necessary to undo a final judgment on adequacy.* Given these considerations, a due process adequacy challenge may succeed in collateral proceedings only if, at a minimum, class members are able to

demonstrate both that the conflict caused them *actual* prejudice and that contravening reliance interests in the judgment on the part of other affected parties are minimal. That was the situation in *Hansberry*, the only case in which the Court found a due process violation on such a collateral attack. *Hansberry* differed from this case in several material respects that are instructive here.

In the first place, as we have explained above, the initial proceeding in *Hansberry* – which was brought to establish the effectiveness of a racially restrictive covenant on property – made *no* effort to protect the interests of the absent class members. See pages 30-31, *supra*. At the same time, the conflict between the class representative and the absent class members was patent and egregious. Their interests were as directly adverse as those of plaintiff and defendant: the class representative wanted to enforce the restrictive covenant and the absent class members did not. See 311 U.S. at 38-40, 44-45. In seeking to bind the class members in the second litigation, those claiming preclusive effect for the first judgment thus effectively argued that "all those who are free alternatively *to assert rights or to challenge them* are of a single class" and that any member of the class "may be deemed adequately to represent any others of the class in litigating their interests *in either alternative*." *Id.* at 45 (emphasis added). Given this peculiar posture, the Court found that the interests of the class representative were "not necessarily or even probably the same" as those of the absent class members. *Ibid.* Other factors also militated against giving the first judgment preclusive effect: there was every indication that the first suit had been collusively resolved, meaning that the reliance interests in the initial judgment (if there were any at all) were weak. *Id.* at 46 ("it does not appear that [the first defendants'] interest in defeating the contract outweighed their interest in establishing its validity").

There was nothing remotely similar here. We have outlined the elaborate protections that Rule 23 guaranteed the absent



class members. Objectors whose interests were the same as those of respondents came forward to litigate the issues that respondents now press. If there was an internal class conflict here at all, it was wholly theoretical. Certainly, at the time of the settlement all asymptomatic class members had an identical interest. *No* class members were directly adverse to one another, as they were in *Hansberry*; all members of the Agent Orange class, the presently ill and the unimpaired, had an identical interest in establishing petitioners' liability and in maximizing the aggregate class recovery. And petitioners' reliance interest in the judgment is manifest. In these circumstances, respondents have not made out the kind of showing necessary to establish that binding them to the class judgment would be so fundamentally unfair as to justify undoing a final judgment.

Indeed, the particular division of settlement proceeds that the Second Circuit identified as the source of the internal class conflict was devised *after the settlement by the district judge*, who indicated repeatedly and at all times throughout the litigation that he was looking out for the interests of all class members. See pages 9-10, *supra*. The court below nevertheless premised its holding on the belief that respondents had been unfairly disadvantaged by the distribution formula. But even if that is so, the error cannot be laid at petitioners' feet. Petitioners negotiated a lump sum settlement that inured to the benefit of the entire class – and they negotiated that settlement with class representatives whose interest at the time, held in common with all class members, lay in obtaining the largest possible payment to the class. The settlement distribution formula that the court of appeals found problematic was subsequently devised by the special master and Chief Judge Weinstein without *any* involvement by petitioners. See pages 9-10, *supra*. And the practical reality that the passage of time now makes it impossible for respondents to obtain a redistribution of the settlement proceeds does not justify

reopening the prior phase of the litigation involving petitioners in which respondents *were* adequately represented.

### B. If Adequacy Of Representation May Be Reexamined On Collateral Review, The Determination Must Be Made As Of The Time Of The Original Class Certification

The Second Circuit committed an additional, fundamental error in applying the due process standard. The question on collateral review logically must be whether the certification decision was correct in light of the law and facts *as they existed at the time of the original litigation*: courts "do not, of course, judge the propriety of class certification by hindsight." *Falcon*, 457 U.S. at 160. See *Uhl*, 309 F.3d at 985 (rejecting argument that the class should be viewed "from an *ex post* perspective"). Here, the court of appeals departed from that principle by engaging in a hindsight review; the analysis below avowedly took account of post-settlement changes in the legal and factual landscape, including significant intervening changes in the law.

The court reasoned erroneously that respondents *must* not have been adequately represented because, as matters ultimately worked out, they became ill after 1994 and therefore did not obtain direct payments from the settlement fund. As has been noted, however, *at the time of certification and settlement* all asymptomatic class members were in precisely the same position. It is only by using an after-the-fact review that it is possible to say that particular class members were (in a relative sense) disadvantaged by the settlement formula. Yet representation that was adequate at the time cannot later be rendered inadequate simply because, as events transpire, some class members obtain greater relief than others.

In addition, the court indicated that it set out to determine the effect on the settlement of *Amchem* and *Ortiz* (see Pet. App. 1a-2a) – decisions handed down a decade after the judgment became final – and the court relied exclusively on those decisions in holding that the class representation had been



inadequate. See *id.* at 19a, 20a. The Second Circuit did so even though it recognized (correctly) that the analysis of adequacy in those holdings marked a significant departure from prior class action law. The court of appeals thus characterized *Amchem* and *Ortiz* as "landmark" decisions (*id.* at 1a), and emphasized this Court's observation in *Ortiz* that "'it is obvious *after Amchem* that a class divided between holders of present and future claims * * * requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.'" *Id.* at 18a (quoting *Ortiz*, 527 U.S. at 856 (emphasis added)). See also *id.* at 19a & n. 9. There accordingly can be little doubt that the treatment of adequacy in *Amchem* and *Ortiz* established a "new rule" in the sense that "the result was neither dictated nor compelled by precedent existing at the time" of the decisions (*Goeke* v. *Branch*, 514 U.S. 115, 120 (1995) (per curiam) (internal quotation marks and citation omitted)), and that the court of appeals invoked that new rule in deciding this case.

Applying a new rule on collateral review, however, was clear error.[12] The Court has noted that "[n]ew legal principles,

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[12] The court below also was wrong on its own terms in concluding that the determination of adequacy in this litigation cannot be squared with the principles applied in *Amchem* and *Ortiz*. To be sure, *Ortiz* stated that it was "obvious after *Amchem*" that a class including present and future claims "requires division into" subclasses with separate counsel to eliminate conflicting interests. 527 U.S. at 856. But that conclusion was specific to the facts of *Amchem* and *Ortiz*. Among other material differences between those cases and this litigation, in *Amchem* and *Ortiz* the critical source of the parties' conflict was the allocation of settlement funds – an allocation that, in contrast to the one here, was worked out between the defendants and the class representatives – in which the goal of "generous immediate payments" to the currently ill class members was in tension with the goal of "ensuring an ample, inflation-protected fund" for the future claimants. *Amchem*, 521 U.S. at 626. Here, in contrast, the petitioners negotiated a lump-sum settlement with the class. As we have noted, the plan for the allocation of the proceeds among the

even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co.*, 514 U.S. at 758. See note 5, *supra*. And the Court's decisions involving habeas corpus make clear that is so even where the law provides a mechanism for collateral attacks on final judgments (as the Second Circuit believed to be the case here). As a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310 (opinion of O'Connor, J.). See, *e.g.*, *Goeke*, 514 U.S. at 120; *Graham* v. *Collins*, 506 U.S. 461, 466-467 (1993); *Butler* v. *McKellar*, 494 U.S. 407, 412-413 (1990).

The same approach plainly is warranted in this setting: the Court has recognized the "significant and compelling parallels" between the application of finality principles in the civil and criminal contexts. 489 U.S. at 309. Indeed, finality concerns "'should not have *as much* place in criminal as in civil litigation'" (*ibid.* (citation omitted) (emphasis in original)); it therefore "would be topsy-turvy, both historically and prudentially, to permit a change of law to upset a civil money judgment more readily than a criminal judgment, which affects liberty." *Norgaard* v. *DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1077 (7th Cir. 1997) (Easterbrook, J.). And that is especially so in the class action context because giving some class members the benefit of subsequent decisions that were not applied to others itself creates an unfair inequity *within* the class. Thus, because *Amchem* and *Ortiz* "heralded a new era of judicial scrutiny of class action certification and settlement" (*Epstein*, 179 F.3d at 651 (Thomas, J., dissenting)), the standards they set out may not be applied in respondents'

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class members was developed by the special master and adopted by the court, not negotiated by the parties. There accordingly is no sense in which the interests of asymptomatic class members were bargained away to increase the settlement value for those already ill.



current collateral attack on a decision that was closed a decade ago.[13]

In addition, as we have noted, a collateral attack could be permissible (if at all) only if binding the absent parties to the prior judgment would deny them due process. *Amchem* and *Ortiz*, however – which arose on direct review and said nothing about how their rule would apply in a collateral attack – did not purport to state due process rules; in relevant part, they expressly went off on the prophylactic provisions of Rule 23(a)(4).[14] Accordingly, respondents may not rely on *Amchem*

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[13] As the habeas cases suggest, it is the burden of respondents – who seek to show that the adequacy determination should have come out differently at the time of the original judgment – to establish that "existing precedent" would have "'compelled'" the outcome they advocate. *Goeke*, 514 U.S. at 120. See, *e.g.*, *Graham*, 506 U.S. at 467. But neither respondents nor the court below made any attempt to establish that "reasonable jurists" in 1983 "'would have felt compelled by existing precedent' to rule in [respondents'] favor." *Ibid.* (quoting *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990)).

[14] See *Ortiz*, 527 U.S. at 830 (explaining that "[t]he nub of this case is the certification of the class under Rule 23(b)(1)(B)," and holding that conditions for certifying such a mandatory settlement class under that rule were not met); *Amchem*, 521 U.S. at 597 (noting that "this case concerns the legitimacy *under Rule 23* * * * of a class-action certification" and holding that requirements for class certification under the rule were not met) (emphasis added); *id.* at 629 ("Rule 23 * * * cannot carry the large load * * * heaped upon it"). In both cases, the Court explained at the outset that it did not have to address threshold justiciability questions because resolution of the Rule 23 certification issues are "logically antecedent to Article III concerns" and "themselves pertain to *statutory* standing." *Ortiz*, 527 U.S. at 831 (emphasis added) (internal citations and quotation marks omitted); *Amchem*, 521 U.S. at 612 (same). Moreover, the Court concluded in *Ortiz* that its "limiting construction" of Rule 23 was justified in part because it *avoided* the necessity of deciding constitutional questions. 527 U.S. at 842-847.

and *Ortiz* to make out the due process violation they must show to avoid being bound by the class settlement.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ANDREW L. FREY
PHILIP ALLEN LACOVARA
CHARLES A. ROTHFELD
RICHARD B. KATSKEE
STEVEN J. DUFFIELD
*Mayer, Brown, Rowe & Maw*
*1909 K Street, N.W.*
*Washington, D.C. 20006*
*(202) 263-3000*

*Counsel for Petitioner*
*Dow Chemical Company*

SETH P. WAXMAN
*Counsel of Record*
LOUIS R. COHEN
JOSHUA S. GOLDWERT
SHIRLEY C. WOODWARD
*Wilmer, Cutler & Pickering*
*2445 M Street, N.W.*
*Washington, D.C. 20037*
*(202) 663-6000*

*Counsel for Petitioner*
*Monsanto Company*

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